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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TERRENCE MCKNIGHT, Defendant and Appellant.	A143997 (San Francisco County Super. Ct. No. SCN215148)

Terrence McKnight appeals his convictions, following a jury trial, for first degree murder and attempted murder. (Pen. Code, §§ 187, 664.) He argues prejudicial error in connection with certain evidentiary rulings, jury instructions, and prosecutorial misconduct. We affirm.

BACKGROUND

Appellant was charged with the murder of Keith Frazier and the attempted murder of Kevin Wortham and Erica Hoskins.[1] The evidence at trial was as follows.

Eyewitness Testimony

Kevin Wortham

On the afternoon of May 17, 2002, Wortham drove his approximately thirteen-year-old brother, Frazier, and his three- or four-year-old sister, Erica, to the Alemany housing project where they lived with their mother. Frazier was sitting in the front

[1] We refer to Erica Hoskins by her first name to avoid confusion with her father, Eric Hoskins. No disrespect is intended.

passenger seat and Erica was sitting behind Frazier. Wortham stopped to talk with Eric Hoskins, Erica's father, then drove a short distance up the street and parked. He started to open his door when a man began firing gunshots into the car. Wortham looked up and saw the shooter running away. The shooter was wearing black clothing and a ski mask covering his face.

Hoskins ran up to the car and Wortham told him he thought the shooter was "Tee Baby." It was undisputed at trial that appellant's nickname was Tee Baby. Wortham met appellant about three or four months before the shooting and they occasionally played basketball or Playstation together. Wortham recognized appellant by his build, gait, and clothing.

Wortham watched as Hoskins chased the shooter uphill. After running some distance, the shooter removed his ski mask. Wortham could see the shooter's face and recognized appellant. Hoskins appeared to be too tired to continue pursuing appellant and he returned to the car; appellant ran away. Frazier had been shot in the head and died; a bullet had grazed Wortham's stomach.[2]

Wortham told a police officer who arrived on the scene that he did not know who the shooter was. He did not identify appellant to the officer because he was "full of anger" and "thought about taking actions into my own hands." During an ambulance ride taking Wortham to the hospital, he spoke to his mother on the phone and told her Tee Baby shot Frazier.[3] When Wortham spoke to police officers at the hospital later that day, he told them Tee Baby was the shooter.[4] Two days later, Wortham identified appellant in a photographic lineup.

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[2] The defense presented a witness who lived in the Alemany projects at the time of the shooting and testified Frazier came to her house three times that day to see if her son could play. The last time was within five minutes of the shooting.

[3] A police officer accompanying appellant in the ambulance testified she overheard Wortham, while on his cell phone, say "Tee Baby did this."

[4] Audio recordings of this interview, as well as a May 20, 2002 interview with Wortham, were played for the jury.

On cross-examination, Wortham admitted making false or inconsistent statements about the shooting. Wortham testified at the preliminary hearing that he saw a man named Andre Glaser with appellant at the time of the shooting. At trial, Wortham conceded this preliminary hearing testimony was false and based on a rumor that Andre Glaser and appellant wanted to kill him. Wortham did not tell investigators the shooter was wearing a mask until 2011. Wortham testified at the preliminary hearing that the shooter had been wearing gray sweats; at trial he testified the shooter's clothing was all black. In one of his 2002 police interviews, Wortham identified the shooter's location in a place the prosecution's trajectory expert testified was not possible in light of forensic trajectory evidence.

Eric Hoskins

Eric Hoskins is Wortham's godfather and Erica's father. On the day of the shooting, he started detailing cars around 9:00 a.m. He saw appellant driving up and down the street. Hoskins knew appellant: about three months before the shooting he began seeing appellant in the neighborhood, and appellant had come to Hoskins's house to see Wortham. About 15 minutes before the shooting, appellant and two other men—whom Hoskins knew as "Younger Dave" and "Taco"—approached Hoskins. Younger Dave started saying something "crazy" to Hoskins and appellant walked around appearing to come behind Hoskins. Taco broke up the confrontation and the three men drove up the street, parking nearby.

Shortly thereafter, Wortham drove up. After Hoskins and Wortham talked, Wortham drove forward about 30 yards and parked. Hoskins had returned to work when an acquaintance, Kevin Martin, cried out that there was a shooting. Hoskins saw a man firing gunshots at Wortham's car from a few feet away. The man was dressed in all black with a ski mask covering his face. Hoskins ran toward the car; the shooter stopped firing and ran up the street. When Hoskins reached the car, Wortham told him the shooter was Tee Baby.

Hoskins ran after the shooter, up a hill. When the shooter reached the top of the hill, about 50 feet away from Hoskins, he took off his ski mask. Hoskins recognized the

shooter as appellant. Hoskins was too tired to continue his pursuit and returned to Wortham's car. As he came down the hill, Hoskins saw Taco driving by and tried to flag him down in the hopes of chasing appellant by car, but Taco did not stop.

Hoskins did not talk to the police about the shooting until November 2002, when police contacted him after learning he was in a vacant home.[5] He testified he did not talk to the police earlier because he "wanted to take the law into my own hands." On cross-examination, Hoskins admitted prior false or inconsistent statements about the shooting. In November 2002, he told the police appellant got into a car after running up the hill, but at trial he said the basis of the statement was "street[] talk." He gave the police a conflicting account of his encounter with appellant, Younger Dave, and Taco prior to the shooting. He told police that he saw Taco's car driving up the hill before the shooting, but at trial testified he did not. He never told anyone prior to 2011 that he had been talking to Martin at the time of the shooting.

Hoskins admitted prior felony convictions for residential burglary in 2004 and possession of an assault rifle in 2006, and admitted lying to the police about his identity in 1997.

Krystal Willingham

Willingham was a reluctant witness who testified at trial she had no memory of the shooting. In an interview with police on May 30, 2002, Willingham said she saw the shooting and identified appellant as the shooter in a photographic lineup.[6] She told the police that, while she did not know appellant's name, she had seen him before at her neighbor's house. Willingham's preliminary hearing testimony was inconsistent with certain aspects of Wortham's and Hoskins's testimony: she testified at the preliminary hearing that the shooter was not wearing a mask, Frazier was outside the car when he was

[5] An audio recording of Hoskins's November 2002 interview was admitted into evidence.

[6] An audio recording of Willingham's police interview was played for the jury.

shot,[7] appellant left in a car right after the shooting, and she did not see anyone chasing appellant's car as it drove away.

Initial Police Investigation

Police officer Daniel Gibbs was the first officer on the scene. Gibbs asked Wortham who shot them and Wortham responded that he did not know. Gibbs and other police officers testified that a police radio report issued within minutes of the officers' arrival on the scene identified the suspect as going by the name "Tee Baby." The trial court admonished the jurors that the description of the suspect was offered only to show the officers' state of mind.[8]

Defense counsel elicited testimony that other police radio reports stated the shooter wore his hair in cornrows and identified the getaway car as a Trans Am with a specific license plate number. Wortham testified he had never seen appellant with cornrows and police officers testified the license plate number was not registered to appellant or a Trans Am, but rather to a rental car.

The Freeway Boys and Jason Glaser

Wortham testified he was part of a group known as the Project Boys who socialized on a basketball court in the Alemany project, while appellant was part of a group known as the Freeway Boys, who "hung out on the freeway." Wortham identified other Freeway Boys as brothers Jason and Andre Glaser, Taco, and Younger Dave. Law enforcement witnesses also testified about the Freeway Boys. Their testimony will be discussed in detail in part II, *post*.

Jason Glaser was killed a few days before the shooting. Wortham testified he had been warned that other Freeway Boys believed he was involved in Jason Glaser's homicide. Hoskins also testified there were rumors that Wortham was responsible for Jason Glaser's death and Wortham's family was worried about his safety.

Appellant's Absence After the Shooting

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[7] The parties stipulated that Frazier was inside the car when shot.

[8] Additional background on this issue is discussed in part I, *post.*

Lateika Irving was romantically involved with appellant in May 2002. Irving saw appellant within a week prior to the shooting but did not see him again afterwards. Prior to his disappearance, appellant never gave Irving any indication that he planned to leave the area.

Batanya Gonzales met appellant in September or October of 2001 and subsequently became pregnant with his child. When Gonzales told appellant about the pregnancy, he was excited. Gonzales saw appellant about four days before the shooting. Appellant was not present when their child was born on June 24, 2002.

Appellant failed to appear at a court hearing for a drug diversion case on May 30, 2002. Appellant was in custody in Texas in June 2003.

Verdict and Sentence

The jury convicted appellant of first degree murder of Frazier (§ 187) and attempted murder of Wortham (§§ 187, 664), and found true allegations as to both counts that he personally used a firearm (§ 12022.53, subds. (c) & (d)). The jury acquitted appellant of the attempted murder of Erica Hoskins.[9] The trial court sentenced appellant to state prison for an aggregate term of 70 years to life.

DISCUSSION

I. *Admission of Evidence Identifying Appellant as a Suspect at the Crime Scene*

Appellant challenges the admission of evidence that unidentified bystanders told police officers at the crime scene that appellant was the shooter.

A. Background

Prior to trial, appellant moved in limine to exclude testimony about the identity of the shooter where the testimony is based on inadmissible hearsay. At issue was identifying information about the shooter provided to police officers at the crime scene. The prosecutor argued the testimony was admissible to show the effect on the officers' state of mind, and the trial court held it admissible for that limited purpose.

[9] The prosecutor argued for conviction on this charge under the kill zone theory.

In his opening statement, the prosecutor told the jurors "you will have evidence that law enforcement is actively looking for Tee Baby, black male, dark complected. That they are actively looking for him within the first eight minutes of this case." Defense counsel objected and the court admonished the jury: "Nothing counsel say is evidence." The prosecutor then clarified, "the reason that you will hear the information [about the suspect descriptions] is because it shows what the officers did."

Four police officers who responded to the shooting testified at trial. When the officers arrived at the scene, a crowd of onlookers had gathered and the officers asked for help identifying the shooter. Within minutes of the officers' arrival on the scene, multiple police radio broadcasts issued information about the shooter. One of these radio broadcasts identified the shooter as follows: "Black male, 5'11", all black clothing, goes by Tee Baby." None of the officers could remember talking to a specific person who provided the identifying information, but they testified the information must have come from one or more persons at the scene. The trial court admonished the jurors that the descriptions of the suspect "are being offered only for state of mind of the officers and what happened next, . . . not for the truth of what's in those statements." The prosecutor reiterated this limited purpose, telling the jury the evidence "is only offered for the purpose of explaining the officer's subsequent conduct" and "is not being offered for the truth; it's merely being offered for the effect of the person who heard that information."

At the close of evidence the jury was instructed: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

During closing arguments, defense counsel emphasized the limited purpose of the crime scene identification: "whenever they tried to bring in a suspect description from the rumors that don't have a source, I would object saying hearsay, and the judge would say, yes, and it's only to be -- to show what the person did, not the truth of what's stated therein. [¶] And it's important in our case because, what it tells you is the only suspect descriptions that may be legally used as proof of the shooter's identity come from the testimony of Kevin Wortham, Eric Hoskins or Krystal Willingham. That is it. Those are

the only places you can look to. [¶] And if somebody during deliberations . . . tries to base the shooter's identification from a source outside that testimony of Kevin, Eric or Krystal, you should immediately send a note out to the judge, informing her of that illegal use of evidence and ask for guidance [on] what to do next, because it's going outside what we believe is the law and the parameters of your deliberations."

In rebuttal, the prosecutor stated one of the suspect descriptions identified the shooter as Tee Baby and defense counsel objected that "[t]here's no evidence for the identity." The trial court admonished the jury, "statements of counsel are not evidence," and the prosecutor continued, "what I am telling you is that this is the person that they're looking for." The prosecutor returned to the identification of the suspect as Tee Baby and defense counsel objected again: "There's no evidence. This is only admitted to show the effect on the listener, not as proof of the identity." The trial court again admonished the jury that "statements of counsel are not evidence" and the prosecutor stated: "What it shows is who they're looking for. That's what it shows. It doesn't show that he was the person who did it; what it shows is who they're looking for. [¶] That's why it's important in terms of their state of mind." Defense counsel objected a third time when the prosecutor returned to the specific suspect description. The trial court admonished the jury: "Ladies and gentlemen, again, this -- a lot of this information, it is up to you -- was offered only for -- to show what the subsequent acts and what the police officers were looking [sic], the intent of the police officers; not for the truth of the matter stated." The prosecutor reiterated the identifications show the police "are actively searching for that person. [¶] And the reason it's significant is because within five minutes, five minutes of [the police] arriving on the scene, they're looking for a suspect that fits that description. [¶] And, in fact, the only thing that caused the case not to be made any sooner than that is the defendant's own conduct of leaving the state. But this case was made within that five-minute period of time.[10] And then we have the identifications. And that's what I'm

[10] The prosecutor repeated this sentiment at other times during his rebuttal: "This case was cracked within five minutes of [the police] arriving on that scene"; "within the first

asking you to base your verdict on, is the identifications that were made by the three witnesses, by Mr. Hoskins, by Mr. Wortham, as well as Ms. Willingham."

B. Admissibility Under State Law

Appellant argues the statements apparently made by bystanders to the police at the crime scene identifying appellant as a suspect were inadmissible because the nonhearsay purpose for which they were admitted was irrelevant. We agree.

" '[A] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.' [Citation.] Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' [Citation.] We review a trial court's relevance determination under the deferential abuse of discretion standard." (*People v. Jablonski* (2006) 37 Cal.4th 774, 820–821.)

The nonhearsay purpose the hearsay statements were admitted for was identified by the trial court and the parties as the effect on the officers' states of mind and subsequent actions.[11] This issue had no relevance to the case: all the officers did as a result of the suspect description was look for the suspect in vain. (See *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110 [nonhearsay purpose of declarant's statement to police irrelevant where "the jury was not asked to determine whether the police had probable cause to arrest [the defendant]" and the statement "had no tendency in reason to prove any disputed issues of fact"]; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 ["[the police officer's] *reaction* or state of mind after the telephone conversation and any actions he took based thereon shed no light on any issues presented in the case"].) Later that day, Wortham told police appellant was the shooter; the crime scene identifications

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five minutes everyone knew that [appellant] was the person who was responsible for this murder."

[11] Although the parties' briefs do not address this issue, it appears appellant did not object on relevance grounds below. We need not decide whether he has forfeited this challenge because, as discussed below, we conclude any error was harmless.

were unnecessary to explain any relevant police actions taken after that. The cases cited by the People, in which a police officer's state of mind or actions were relevant, are inapposite. (See *People v. Ervine* (2009) 47 Cal.4th 745, 774–775 (*Ervine*) [nonhearsay purpose of statement to police relevant to special circumstance allegation that officers were engaged in the lawful performance of their duties]; *People v. Mayfield* (1997) 14 Cal.4th 668, 750–751 [nonhearsay purpose of statement to police relevant to issue of whether officer used excessive force], abrogated on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

The People argue "evidence that appellant was an immediate focus of the police investigation was admissible to prove that appellant's sudden flight from the Bay Area reflected his consciousness of guilt." The People reason that, without testimony about the suspect identification, "[t]he jurors might have speculated that there was no evidence that appellant had been aware that the police were looking for him"; but with the testimony, the jurors could infer that (1) the suspect description was broadcast, via the police radios, to the assembled onlookers; (2) news that appellant was a suspect spread through the community; and (3) this news would have spread to appellant. We need not decide whether this attenuated theory is sufficient because we have found no point in the record where the jury was told this was a purpose for which they could consider the evidence.

C. Confrontation Clause

Appellant also argues admission of the statements violated his confrontation clause rights. As an initial matter, "[t]he confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 674 (*Sanchez*).) The challenged statements were not offered for the truth. Even assuming, as appellant contends, the

evidence was nonetheless used for the truth, we conclude the statements were nontestimonial and therefore find no confrontation clause violation.[12]

"In *Crawford v. Washington* (2004) 541 U.S. 36, (*Crawford*), the United States Supreme Court held, with exceptions not relevant here, that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*Sanchez, supra,* 63 Cal.4th at p. 670.) "As the *Crawford* doctrine evolved, the court concluded that not all statements made in response to police questioning would constitute testimonial hearsay. . . . [T]he high court articulated a test based on the 'primary purpose' for which the statements are made. 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' " (*Sanchez,* at pp. 687–688.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*), the primary purpose test was applied to statements made to police officers responding to a shooting. In that case, as our Supreme Court recounted, "in response to a dispatch, officers came upon a badly injured shooting victim lying in a parking lot. The victim answered questions about the circumstances, location, and perpetrator of the shooting. The victim died and Bryant was charged with his murder. The parking lot statements were admitted and the high court ruled they were not testimonial." (*Sanchez, supra,* 63 Cal.4th at p. 688.) The *Bryant* court first found "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." (*Bryant, supra,* at p. 374.) The *Bryant* court then turned to "the ultimate

[12] The People contend appellant forfeited this challenge. We need not decide the forfeiture issue because we reject the challenge on the merits.

inquiry[,] . . . whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.' " (*Bryant, supra,* at p. 374.)

Our Supreme Court summarized *Bryant's* analysis: "*Bryant* refined the 'primary purpose' standard by emphasizing the test is objective and takes into account the perspective of both questioner and interviewee: '[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.' [Citation.] In concluding the shooting victim's statements to police were nontestimonial, *Bryant* observed that the officers' questioning of the victim was objectively aimed at meeting an ongoing emergency. [Citation.] The victim's responses indicated the shooter's whereabouts were unknown and there was 'no reason to think that the shooter would not shoot again if he arrived on the scene.' [Citation.] Finally, the court observed that the circumstances in which the statements were made were far from formal. The scene was chaotic; the victim was in distress; no signed statement was produced." (*Sanchez, supra,* at pp. 688–689.)

There can be little dispute that there was an ongoing emergency at the time the statements challenged here were made. As in *Bryant,* a fatal shooting had just taken place and the location of the armed shooter was unknown. Also like *Bryant,* the circumstances indicate the primary purpose of the statement was to respond to the emergency. There was a chaotic scene, a dead child in the street, and the statements were not memorialized in writing. Gibbs testified the dispatches containing the identification information were made for purposes of officer safety; it is reasonable to conclude the underlying inquiries were as well.

We reject appellant's arguments to the contrary. Appellant contends *Bryant* is distinguishable because the declarant in that case was a "credible source[]" for identifying the perpetrator. We see no relevance to the critical issue of determining the primary purpose for which the statement was made. Appellant notes officer safety was no longer an issue at the time of trial, but fails to explain how this impacts the primary

purpose at the time the statements were made. Appellant contends there can be no analysis of the circumstances in which the statement was made if the declarant is unknown. While we are unable to consider the declarant's specific statements and actions, we are persuaded that the record provides us with sufficient information to determine that the primary purpose of the statement was not testimonial.

D. Prejudice

Because there was no confrontation clause violation, we review the error for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162–1163 [error in admitting out of court statement for irrelevant nonhearsay purpose reviewed for prejudice under *Watson* standard].) We conclude it is not reasonably likely the result would have been more favorable absent the error.

To be sure, appellant correctly contends that the prosecution's three eyewitnesses—Wortham, Hoskins, and Willingham—all had substantial weaknesses. Wortham and Hoskins both made inconsistent prior statements, and significant aspects of Willingham's testimony differed from that of Wortham and Hoskins. We do not minimize the potential significance, in such a case, of the admission of an out-of-court statement corroborating the identification made by such witnesses. However, in this case, we are persuaded the error was not prejudicial.

First, the jury was repeatedly admonished by the trial court about the limited nature of the evidence: during the trial testimony, the prosecutor's closing argument, and the jury charge. It is well established that "we presume the jury faithfully followed the court's limiting instruction." (*Ervine, supra,* 47 Cal.4th at p. 776.) As appellant notes, at times during the trial testimony the limited purpose was expressed by counsel rather than the court. However, we see no basis to conclude that counsel's statement of the limitation impeded the jury's understanding of the evidence's limited purpose or undermined the trial court's instructions. During closing arguments, both defense counsel and the prosecutor specifically underscored the limitation. Defense counsel told the jury, "the only suspect descriptions that may be legally used as proof of the shooter's

identity come from the testimony of Kevin Wortham, Eric Hoskins or Krystal Willingham." The prosecutor similarly said, "what I'm asking you to base your verdict on, is the identifications that were made by the three witnesses, by Mr. Hoskins, by Mr. Wortham, as well as Ms. Willingham."

Appellant points to the statements in the prosecutor's rebuttal argument that "[t]his case was cracked within five minutes of [the police] arriving on that scene," and "within the first five minutes everyone knew that [appellant] was the person who was responsible for this murder." We agree the statements appear to rest on the truth of the out-of-court identification and were not appropriate argument. However, considering the record as a whole, the statements do not negate the repeated admonishments to the jury regarding the limited purpose of the evidence. We note nothing in the eight jury notes sent during deliberations suggests the jury ignored the admonition or focused on the crime scene identification evidence.

Second, the evidence implicating appellant was not insubstantial. All three of the testifying eyewitnesses knew appellant before the shooting and all unequivocally identified him as the shooter, even if other elements of their stories varied over time and among themselves. Notably, Willingham had no apparent motive to lie about being present at the shooting or about the identity of the shooter. There was evidence of appellant's flight immediately after the shooting indicating consciousness of guilt; this evidence was not rebutted and the defense suggested no alternative reason for his departure. There was evidence of a motive for appellant to commit the shooting.

Accordingly, it is not reasonably probable that, absent the error in admitting the out-of-court statements identifying appellant as a suspect at the crime scene, a more favorable verdict would have issued.

II. *Admission of Freeway Boys Evidence*

Appellant argues evidence about the Freeway Boys should have been excluded under Evidence Code section 352. We find no prejudicial error.

A. Background

As discussed above, Wortham testified appellant, Andre Glaser, and Taco, among others, were members of the Freeway Boys. Officer Gibbs testified the Freeway Boys was a "not a gang affiliation but more of a clique." Another law enforcement witness testified there were no validated street gangs in the Alemany projects in 2002.

Officer Gibbs testified to seeing graffiti on the 500 block of Alemany saying, "Freeway Boys" and "RIP WB," which Gibbs explained was a reference to Jason Glaser, who had been known as "White Boy." Gibbs also saw a man on the 500 block of Alemany wearing a t-shirt saying, "Freeway Boys." Gibbs further testified that on March 20, 2002, on the 500 block of Alemany, he came into contact with appellant and Andre Glaser. At that time, Gibbs arrested appellant for a felony drug offense.[13] The case was later dismissed by the district attorney.

In June 2003, appellant mailed a letter from Texas to Justin Wilson, identified by a law enforcement witness as a Freeway Boys member. The letter was written in conversational street slang and Sergeant Kevin Knoble provided a "translation."[14] In the letter, appellant did not use the term "Freeway Boys," but asked Wilson to say "hi" to Taco and to tell Andre Glaser to contact appellant privately.[15]

B. Analysis

Appellant argues admission of evidence about the Freeway Boys was error under Evidence Code section 352 because it was minimally probative, as evidence appellant

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[13] The trial court ruled the evidence of appellant's arrest for a felony drug offense was admissible because the arrest resulted in the June 2002 court date, which appellant missed, evidencing his flight from the area. More specific testimony about appellant's illegal activity in connection with this arrest was elicited on cross-examination and, after the court ruled appellant opened the door, on redirect.

[14] The trial court designated Knoble as an expert in "the use and meaning of words, phrases and content of letters written in street terminology in . . . the Alemany projects."

[15] The letter also included the line, "keep smashin and his foot on those Bustaz necc ya dig," which Knoble interpreted to mean, "keep your foot on our enemies' neck, . . . break the necks of those that aren't our friends."

was a friend or associate of Jason Glaser was sufficient to show motive, and highly prejudicial, being "introduced as gang evidence in all but name."

"The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

We do not understand appellant to be challenging the evidence that he was a member of a group known as the Freeway Boys—setting aside for the moment the additional evidence introduced about the Freeway Boys—as Wortham testified and as suggested by the references to Taco and Andre Glaser in appellant's letter to Wilson. To the extent he is, we reject the challenge. As appellant argues, his association with the Freeway Boys may not have been substantially more probative of motive than evidence demonstrating his friendship with Jason Glaser. However, neither was this evidence alone particularly prejudicial.

The additional evidence about the Freeway Boys—the graffiti and appellant's drug arrest in the presence of another Freeway Boys member and in a location associated with the Freeway Boys—presents a closer question. As appellant contends, this evidence arguably suggests the Freeway Boys was a criminal gang and the additional probative value was not substantial.[16] We need not decide whether admission of this evidence was error because any error was harmless.

The danger of prejudice from gang evidence is the "risk the jury will impermissibly infer a defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Montes* (2014) 58 Cal.4th 809, 859.) As an initial matter, it is unlikely the jury in fact considered the Freeway Boys a gang. As noted above, Officer

[16] The defense did not dispute the existence of the Freeway Boys at trial; defense counsel offered to stipulate to the group's existence to avoid admission of some of this evidence.

Gibbs testified the Freeway Boys was not a gang and another prosecution law enforcement witness testified there were no validated street gangs in the Alemany projects at the time of the shooting. Moreover, the trial court specifically admonished the jury, "in this case there [are] no allegations that there's been any street gang activity, nor, again, that [the prosecutor] has indicated, that the Freeway Boys or the Project Boys were street gangs."

To the extent that, despite this testimony and admonition, the jury considered the Freeway Boys a gang, *People v. McKinnon* (2011) 52 Cal.4th 610 is instructive. The court found the admission of gang evidence proper, noting factors that reduced the risk of prejudice: "the gang evidence was a relatively minor component of the prosecution's case, and was not unduly inflammatory. It did not emphasize the general violent nature of gang activity or suggest that defendant's gang membership predisposed him to violent crimes, but instead focused narrowly on the prosecution's theory for why defendant might have had a specific reason to kill [the victim]." (*Id.* at p. 656.) As in *McKinnon*, there was no evidence the Freeway Boys engaged in violence[17] and the prosecution used the Freeway Boys evidence solely to explain appellant's motive for shooting Wortham. Any error was harmless.

III. *Exclusion of One of Hoskins's Convictions*

As noted above, impeachment evidence was produced at trial that Hoskins was convicted of residential burglary in 2004 and possession of an assault rifle in 2006, and that he gave false information about his identity to a police officer in 1997. The trial court ruled appellant could not introduce evidence of a 1995 conviction for sale of a controlled substance, finding it too remote. Appellant argues the exclusion of the 1995 conviction was error. We disagree.

[17] Appellant notes the prosecutor's opening statement referenced the Freeway Boys possessed guns. Upon defense counsel's objection, the trial court remarked the prosecutor was only saying "what he thinks his evidence is going to show." No such evidence was produced at trial, and the court admonished the jury multiple times that statements of counsel were not evidence.

" '[T]rial courts retain their discretion under Evidence Code section 352 to bar impeachment with [felony] convictions [involving moral turpitude] when their probative value is substantially outweighed by their prejudicial effect. [Citation.] . . . When the witness subject to impeachment is not the defendant, those factors [considered by the trial court] prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654 (*Clair*).) "A ruling of this sort is reviewed for abuse of discretion." (*Id.* at p. 655.)

Appellant argues the 1995 conviction was non-prejudicial, relevant impeachment evidence. We agree with appellant that the 1995 conviction held little risk of unfairly prejudicing the prosecution's case: the jury already knew of two of Hoskins's felony convictions, and a conviction for drug sales was not likely to be inflammatory. However, the 1995 conviction was 17 years old at the time of trial and arguably of minimal probative value.[18] The trial court's exclusion of the 1995 conviction was not an abuse of discretion. That "another court might have concluded otherwise . . . does not establish that the court here 'exceed[ed] the bounds of reason.' " (*Clair, supra,* 2 Cal.4th at p. 655.)

Appellant also suggests the 1995 conviction was probative of Hoskins's employment status at the time of the shooting. Appellant contends the prosecutor portrayed Hoskins as gainfully employed in contrast to appellant's lack of employment, and appears to argue the 1995 drug sales conviction gives rise to an inference that Hoskins was still engaged in illegal activity in 2002 when the shooting took place. Assuming such an inference is reasonable, and even if appellant could have overcome the limitation on character evidence imposed by Evidence Code section 1101, subdivision (a), appellant has not demonstrated he argued this ground for the admission of the

[18] Although appellant suggests the age of the conviction should be measured from the time of the crime, he cites no authority to this effect. (See *People v. Mickle* (1991) 54 Cal.3d 140, 172 [measuring from time of trial]; *People v. Morris* (1991) 53 Cal.3d 152, 195 [same], disapproved of on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

conviction below. He cannot raise it now. (*Clair, supra*, 2 Cal.4th at pp. 655–656 [where the defendant sought below to use a witness's conviction generally to challenge his character, but "never sought permission for a specific attack [to show a motive to lie] . . . [h]e may not now raise any complaints in this regard"].)

IV. *Second Degree Murder Instruction*

Appellant challenges the trial court's jury instruction on second degree murder. We reject the challenge.

The jury was instructed on the elements of murder and on express and implied malice. The jury was then instructed: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree." Next, the jury was instructed on the theories of first degree murder and directed: "The requirements for second degree murder based on express or implied malice are explained in No. 520 [the previous instruction on the elements of murder]. . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Appellant argues the instructions "did not provide a path to second degree [murder] or provide the jury with a meaningful instruction on degree." Appellant points to revised CALCRIM instructions as providing the missing information.[19] The revised

[19] The People note the trial court instructions conformed to a previous version of the CALCRIM instructions (see CALCRIM Nos. 520 & 521 (Oct. 2010 rev.)); appellant notes this version had recently been revised at the time the jury was charged. Neither fact is dispositive: CALCRIM instructions can be incorrect, and the revision of a CALCRIM instruction does not necessarily mean the prior version was defective. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 ["CALJIC No. 14.54 as presently drafted is an incorrect statement of the law"]; *People v. Lucas* (2014) 60 Cal.4th 153, 294 ["The fact that the commission ultimately drafted the newer CALCRIM instructions, which the Judicial Council subsequently adopted [citation], does not establish that the prior CALJIC instructions were constitutionally defective. ' "Nor did their wording become inadequate to inform the jury of the relevant legal principles or too confusing to be understood by jurors." ' "], disapproved of on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 53 fn. 19.)

CALCRIM No. 520 provides: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree . . . ." (CALCRIM No. 520 (Feb. 2013 rev.).) The revised CALCRIM No. 521 provides: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." (CALCRIM No. 521 (Feb. 2013 rev.).)

Our inquiry is "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts. [Citations.] 'In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' " (*People v. Kelly* (1992) 1 Cal.4th 495, 525–526.) The jury was instructed on the elements of murder and told if they decided appellant committed murder, they must decide whether the murder was first or second degree. The jury was then instructed on first degree murder, told they must acquit on first degree murder if the People did not prove beyond a reasonable doubt the murder was first degree, and directed to the instruction providing the elements of murder for "[t]he requirements for second degree murder based on express or implied malice . . . ." With these instructions, it is reasonably likely the jury understood that if they found the People proved appellant committed murder but did not prove he committed first degree murder, then they should convict him of second degree murder. We note appellant has pointed to no jury notes suggesting any confusion on this issue and no argument by either counsel creating any possible confusion.[20]

V. *Lying in Wait Instruction*

[20] To the contrary, the prosecutor argued to the jury when "the act of the killing as well as the malice" are both proven, "[t]hat would be simply second degree murder. [¶] But there is something that happened in this case that moves it beyond second degree murder."

The jury was instructed on two theories of first degree murder: premeditation and lying in wait. Appellant argues there was insufficient evidence to support a first degree murder conviction based on lying in wait and the jury should not have been instructed on this theory.[21] We need not decide this issue because any error was harmless.

Appellant argues the first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt the asserted error did not contribute to the verdict. Appellant is mistaken. "The nature of th[e] harmless error analysis depends on whether a jury has been presented with a legally invalid or a factually invalid theory. When one of the theories presented to a jury is legally inadequate, such as a theory which ' "fails to come within the statutory definition of the crime" ' [citation], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' [Citation.] [¶] In contrast, when one of the theories presented to a jury is factually inadequate, such as a theory that, while legally correct, has no application to the facts of the case, we apply a different standard. [Citation.] In that instance, we must assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.' [Citation.] We will affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' " (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

The asserted error here is factual, not legal. Accordingly, we affirm unless the record demonstrates a reasonable probability the jury found appellant guilty based on

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[21] "Lying-in-wait murder consists of three elements: ' " '(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.' " ' " (*People v. Russell* (2010) 50 Cal.4th 1228, 1244, fn. omitted.)

lying in wait. There is no basis in the record for such a conclusion. The prosecutor's closing arguments argued both theories and there were no jury notes about the issue. The other verdicts provide no insight into the basis of the first degree murder conviction. Appellant does not dispute there was substantial evidence to support the conviction based on the premeditation theory. Any error in instructing the jury on lying in wait was harmless. (See *People v. Poindexter* (2006) 144 Cal.App.4th 572, 586–587 [no reasonable probability jury found the defendant guilty solely on lying in wait theory where prosecutor argued both theories, there were no jury notes on the issue, and there was sufficient evidence to support first degree murder conviction based on premeditation and deliberation].)

VI. *Prosecutorial Misconduct*

Appellant argues the prosecutor committed prejudicial misconduct during his opening statement, witness examination, and closing argument. We reject the claim.

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, as all of defendant's claims are, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' [Citation.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305 (*Gonzales*).)

A. Opening Statement

Appellant challenges three statements in the prosecutor's opening argument as unsupported by the evidence at trial: that "among the activities that the Freeway Boys engaged in were possession of guns as well as the selling of drugs"; that the police

investigated Wortham as a suspect in the Jason Glaser homicide but he "was neither arrested, nor was he charged"; and that appellant has never seen the child he had with Gonzales.

Appellant failed to object below to the third statement and has therefore forfeited the challenge (*Gonzales, supra,* 52 Cal.4th at p. 305), although we would reject it in any event. " '[R]emarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor "was 'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.' " ' " (*People v. Dykes* (2009) 46 Cal.4th 731, 762.) Appellant has made no such showing with respect to any of the challenged statements. Moreover, any prejudice was addressed by the trial court's instruction—before opening statements, upon defense counsel's objection during the prosecutor's opening statement, and at the close of evidence—that the attorneys' remarks did not constitute evidence. (*People v. Hinton* (2006) 37 Cal.4th 839, 863 ["the trial court's instructions before opening statement and again before closing argument that the attorneys' statements were not evidence would have dispelled any prejudice"].)

B. Witness Questioning

Appellant argues the prosecutor's elicitation of testimony about the crime scene identifications of appellant was misconduct. In part I, *ante*, we concluded the admission of this evidence was error, but harmless. Appellant's characterization of the error as prosecutorial misconduct does not alter our conclusion that he was not prejudiced by the evidence.[22]

Appellant next argues the prosecutor committed misconduct by eliciting testimony that appellant was not employed and not attending school. Appellant contends this

[22] Appellant emphasizes the prosecutor's use, during the police officers' testimony, of a "big board" containing a printout of the suspect identification broadcasts. Appellant has not demonstrated this board was published to the jury and the record indicates it was not: the trial court ruled before trial the information should not be published to the jury; during the officers' testimony the trial court commented, in response to defense counsel's query apparently about the board, that "it's not being publish[ed] to the jury"; and the boards were not admitted into evidence.

questioning was inappropriate, relying on *People v. Criscione* (1981) 125 Cal.App.3d 275 (*Criscione*). We assume without deciding appellant did not forfeit this challenge, and find it meritless. In *Criscione,* the defendant pled not guilty by reason of insanity to a murder charge. (*Id.* at p. 280.) During trial, the prosecutor "insinuated by his questions that half of all mental illness is feigned" and asked questions "foreshadow[ing]" his theory, which he argued in closing, "that appellant's violent attitudes and conduct toward the [female] victim, and women in general, were not symptomatic of mental disease, but merely the normal responses of a man raised in a traditional Italian culture." (*Id.* at pp. 286–287, 289.) The Court of Appeal concluded the prosecutor engaged in misconduct, finding the "most invidious" aspect was "the palpably false nature of the information argued, which can only have been intended to divert the jury from a rational consideration of the grave question of appellant's sanity." (*Id.* at p. 290.) Appellant's reliance on *Criscione* is misplaced. The prosecutor's questions about appellant's employment status did not improperly inject the prosecutor's opinion, but elicited witness testimony about a factual matter. There is no basis to conclude the testimony appellant was unemployed was "palpably false." Appellant has identified no portion of the record in which the prosecutor made any improper argument based on appellant's employment status. The prosecutor's conduct in this line of questioning was proper.

C. Closing Statement

Appellant argues the prosecutor improperly relied on the evidence of the crime scene identification of appellant—which was admitted for the limited purpose of the effect on the officers—for the truth of the matter. As noted in part I, *ante,* we agree that some of the prosecutor's comments appear to have improperly relied on the truth of the identification. However, as also discussed in part I, the trial court's admonitions, as well as the prosecutor's own statement that he was relying solely on the identification of the three testifying eyewitnesses, rendered the error harmless.[23]

[23] Appellant argues the trial court's responses to his objections below defeats the presumption that the jury follows instructions. Appellant points to the trial court's admonishment, in response to one objection, that statements of counsel are not evidence.

Appellant also argues no evidence supported the prosecutor's statement that "of all the Freeway Boys that we know of, only one took off and left our fair city of San Francisco." Appellant failed to object to the statement and has forfeited his challenge. (*Gonzales, supra,* 52 Cal.4th at p. 305.)

Finally, appellant argues the prosecutor improperly denigrated defense counsel's function. In the prosecutor's rebuttal argument, he said defense counsel "has done an outstanding job. . . . [¶] In terms of job, though, what you really have to appreciate is what the Defense's job is, okay. [¶] And that is, regardless of whether or not your client did it, you defend him. And you use the D's of Defense: Decontextualize." The prosecutor then argued defense counsel had taken one of Wortham's statements to the police out of context. The prosecutor continued: "Another D is that you delay," noting appellant's flight from the jurisdiction. The prosecutor concluded: "One of the other D's of Defense is you divert attention," arguing defense counsel highlighted an innocuous line in appellant's letter to Justin Wilson and ignored what the prosecutor argued was an incriminating line in the same letter.

As an initial matter, appellant did not object below and forfeited this challenge. We would reject it in any event. " 'A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.' " (*People v. Redd* (2010) 48 Cal.4th 691, 734.) However, " '[t]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account.' " (*Id.* at

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However, in response to a later objection, the court stated the evidence "was offered only . . . to show what the subsequent acts and what the police officers were looking [for], the intent of the police officers; not for the truth of the matter stated." Moreover, the prosecutor informed the jury he was relying on the identification solely of the three eyewitnesses. *People v. Lloyd* (2015) 236 Cal.App.4th 49, in which "the prosecutor misstated the law with the effect of lightening her burden of proof, defense counsel objected, and the court overruled the objection," is inapposite. (*Id.* at p. 63; see also *ibid.* ["In failing to cure the misstatement of law, the court placed its considerable weight behind the misstatement. In such a situation the court gives the jury two conflicting legal interpretations. Under these circumstances, we may not presume the jury followed the court's instruction when the court also signaled to the jury the prosecutor's misstatements of law were correct."].)

p. 735.) Where the prosecutor's argument "would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel," the claim will be rejected. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*).) Our Supreme Court has rejected prosecutorial misconduct claims targeting statements that the defense counsel's " 'job is to create straw men . . . . [and] put up smoke, red herrings"' (*Cunningham, supra,* at p. 1002); " 'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something' " (*People v. Medina* (1995) 11 Cal.4th 694, 759); and a " 'heavy, heavy smokescreen . . . has been laid down [by the defense] to hide the truth from you' " (*People v. Marquez* (1992) 1 Cal.4th 553, 575). As in these cases, the challenged argument here would not be understood by the jury as a personal attack on defense counsel, but rather an exhortation to focus on the evidence at trial. The comments were well within the "wide latitude" afforded the prosecutor and did not constitute misconduct.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.